

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

ROOSEVELT MARSH III. ,

Petitioner,

vs.

V.M. ALMAGER, Warden

Respondent.

CASE NO. 08-CV-1067 W (CAB)

**ORDER (1) ADOPTING REPORT  
AND RECOMMENDATION  
(DOC. NO. 13) AND (2)  
GRANTING MOTION TO  
DISMISS (DOC. NO. 10)**

Petitioner Roosevelt Marsh III ("Petitioner"), a state prisoner proceeding *pro se*, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 ("Petition"). On October 14, 2008, Respondent V.M. Almager ("Respondent") filed a Motion to Dismiss. On November 7, 2008, Petitioner filed his opposition. On November 13, 2008, United States Magistrate Judge Cathy Ann Bencivengo issued a Report and Recommendation ("Report"), recommending that this Court grant the motion. On December 12, 2008, Petitioner filed his objection to the Report.

The Court decides the matter on the papers submitted and without oral argument. See Civ. L.R. 7.1(d.1). For the reasons outlined below, the Court **ADOPTS**

1 the Report (Doc. No. 13), **GRANTS** the motion (Doc. No. 10) and **DISMISSES** the  
2 Petition **WITH PREJUDICE**.

3  
4 **I. BACKGROUND**

5 Petitioner did not object to the following factual summary taken from the Report.

6 On November 14, 2001, a jury convicted Petitioner of assault, in violation of  
7 California Penal Code § 245(a)(1), with a further finding that Petitioner inflicted great  
8 bodily injury on the victim, within the meaning of Penal Code § 12022.7(a). Petitioner  
9 admitted to a previous strike, a serious felony prior, and a prison prior. Petitioner was  
10 sentenced to sixteen years in state prison.

11 Petitioner appealed. On January 22, 2003, the California Court of Appeal denied  
12 his appeal, and on April 30, 2003, the California Supreme Court denied his petition for  
13 review.

14 On December 10, 2003, Petitioner filed a habeas petition in the San Diego  
15 Superior Court that was denied on January 8, 2004. On November 1, 2004, Petitioner  
16 filed a petition in the California Court of Appeal, which was denied on December 7,  
17 2004. On January 5, 2005, Petitioner attempted to file a petition in the California  
18 Supreme Court, but it was rejected due to lack of an original signature. The petition  
19 was presumably re-filed at a later date and summarily denied on March 15, 2006.

20 On April 27, 2006, Petitioner filed a federal habeas petition, which was dismissed  
21 without prejudice on May 11, 2006. See Marsh v. Giurbino, S.D. Cal. Civil Case No.  
22 06cv961 WQH (LSP).

23 On February 28, 2007, Petitioner commenced a second round of state collateral  
24 review in the San Diego Superior Court. On April 19, 2007, the petition was denied. On  
25 May 10, 2007, Petitioner filed a petition in the court of appeal, which was denied on July  
26 31, 2007. On August 26, 2007, Petitioner filed a petition in the California Supreme  
27 Court that was denied on March 12, 2008.

1 On June 7, 2008, Petitioner commenced this habeas proceeding. On October 14,  
2 2008, the government filed a motion to dismiss, arguing that the Petition is time bared.  
3 On November 13, 2008, Judge Bencivengo issued the Report recommending that the  
4 Court grant the motion. The Report found that the Petition is time barred as it far  
5 exceeded the one-year statute of limitation provided by the Antiterrorism and Effective  
6 Death Penalty Act, 28 U.S.C. 2254 ("AEDPA"), and it did not qualify for a sufficient  
7 amount of statutory or equitable tolling to render it timely.

8 On December 12, 2008, Petitioner filed his objection to the Report. Petitioner  
9 argues that the Petition is timely because the Report incorrectly determined the amount  
10 of tolling warranted. Petitioner also seems to argue that his claim based on Cunningham  
11 v. California, 549 U.S. 270 (2007), is timely because the second round of state habeas  
12 petitions began on February 28, 2007, which was within one year of that decision.

## 13 14 II. LEGAL STANDARD

15 The duties of the district court in connection with a magistrate judge's report and  
16 recommendation are set forth in Rule 72(b) of the Federal Rules of Civil Procedure and  
17 28 U.S.C. § 636(b)(1). The district court "must make a de novo determination of those  
18 portions of the report ... to which objection is made," and "may accept, reject, or modify,  
19 in whole or in part, the findings or recommendations made by the magistrate." 28  
20 U.S.C. § 636(b)(1)(C); see also United States v. Remsing, 874 F.2d 614, 617 (9th Cir.  
21 1989); United States v. Raddatz, 447 U.S. 667, 676 (1980).

## 22 23 III. DISCUSSION

24 Having read and considered the Petition, the Report, and Petitioner's objections  
25 thereto, the Court finds the Report presents a well-reasoned analysis of the issues. The  
26 Court therefore concludes that the Petition is time barred.

1           **A. Petitioner is not entitled to 297 days of equitable tolling.**

2           The Petition is governed by the provisions of AEDPA. See Lindh v. Murphy, 521  
3 U.S. 320, 336 (1997). AEDPA imposes a one-year statute of limitations for a state  
4 prisoner filing a federal-habeas petition. 28 U.S.C. §2244(d)(1). Petitioner does not  
5 object to the Report's conclusion that the one-year limitation period began to run on  
6 April 30, 2003.

7           The Report found, however, that the Petition is untimely because Petitioner  
8 allowed 297 days to elapse between the Superior Court's denial of his first state habeas  
9 petition and the subsequent filing of the petition with the appellate court. The Report  
10 relied on Evans v. Chavis, 546 U.S. 189 (1996), wherein the United States Supreme  
11 Court found a six-month "unjustified" and "unexplained" delay unreasonable. Petitioner  
12 objects, arguing that under the circumstances, his delay was not unreasonable.

13           The one-year limitation period is subject to statutory tolling for the "time during  
14 which a properly filed application for State post-conviction or other collateral review  
15 with respect to the pertinent judgment or claim is pending." 22 U.S.C. § 2244(d)(2).  
16 A petition for habeas corpus is considered pending "while a California Petitioner  
17 completes a full round of state collateral review." Delhomme v. Ramirez, 340 F.3d 817,  
18 819 (9<sup>th</sup> Cir. 2003) (*per curiam*). However, a petitioner is entitled to statutory tolling for  
19 a complete round of state collateral review only if the habeas petitions are filed within  
20 a "reasonable time" between the lower court's denial of the petition and the filing of the  
21 petition in the higher state court. Evans, 546 U.S. at 193.

22           Here, Petitioner contends that the 297-day delay was due to the Superior Court's  
23 alleged failure to respond to Petitioner's motion for a copy of his original writ, which  
24 Petitioner alleges was needed to help him prepare the state appellate court petition. The  
25 Court is not persuaded.

26           As an initial matter, despite the Superior Court's denial of Petitioner's initial  
27 habeas petition on January 8, 2004, he waited until May 30, 2004 (142 days) to request  
28 a copy of the petition. Petitioner fails to explain the delay. Moreover, it is clear that

1 Petitioner did not need a copy of the initial petition in order to prepare the appellate  
2 court petition, given that he was able to prepare the initial petition from scratch. For  
3 these reasons, the Court finds Petitioner's 297-day delay unreasonable and thus he is not  
4 entitled to statutory tolling.

5 Nor is Petitioner entitled to equitable tolling for the 297 days. AEDPA's one-year  
6 limitations period is subject to equitable tolling only when "extraordinary circumstances"  
7 beyond a prisoner's control make it impossible to file a petition on time." Frye v.  
8 Hickman, 273 F.3d 1144, 1146 (9th Cir. 2001) (citations omitted). "When external  
9 forces, rather than a petitioner's lack of diligence, account for the failure to file a timely  
10 claim, equitable tolling of the statute of limitations may be appropriate." Lott v. Mueller,  
11 304 F.3d 918, 922 (9th Cir. 2002) (quoting Miles v. Prunty, 187 F.3d 1104, 1107 (9th  
12 Cir. 1999)).

13 Here, Petitioner's 142-day delay in requesting a copy of his initial petition  
14 demonstrates a lack of diligence. And given Petitioner's ability to prepare the initial  
15 petition without an exemplar, it is clear that the superior court's alleged failure to  
16 respond to Petitioner's motion for a copy did not make it "impossible" to file the  
17 appellate court petition. Accordingly, Petitioner is not entitled to equitable tolling.

18  
19 **B. Assuming Petitioner is entitled to 297 days of tolling, the Petition**  
20 **remains time barred.**

21 The Report alternatively found that even if Petitioner was entitled to tolling for  
22 the entire 297-day period, the Petition is nevertheless time barred.

23 As explained in the Report, the California Supreme Court summarily denied  
24 Petitioner's habeas petition on March 15, 2006. 348 days later, on February 28, 2007,  
25 Petitioner initiated a second round of state collateral relief. This 348-day period was not  
26 tolled. See Biggs v. Duncan, 339 F.3d 1045, 1048 (9th Cir. 2003) (petitioner not  
27 entitled to statutory tolling for time before he begins a second round of state petitions).  
28 Accordingly, "[c]ombined with the previous 133 days of untolled time [before Petitioner

1 filed his first state habeas petition], by the time Petitioner commenced a second round  
 2 of collateral relief in Superior Court on February 28, 2007, 481 days of untolled time had  
 3 passed, well in excess of AEDPA's one-year limitation period." (*Report*, 6:18–20.) For  
 4 this additional reason, the Court finds the Petition is time barred.

5  
 6 **C. Petitioner is not entitled to a new statute of limitations.**

7 Although not entirely clear, Petitioner seems to argue that under 28 U.S.C.  
 8 §2244(d)(1)(C), the statute of limitations did not begin to run on Petitioner's sentencing  
 9 claim until Cunningham was decided. Petitioner is wrong.

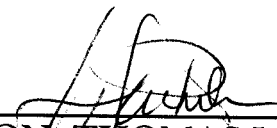
10 Section 2244(d)(1)(C) provides that the one-year period shall not run until "the  
 11 date on which the constitutional right asserted was initially recognized by the Supreme  
 12 Court, if the right has been newly recognized by the Supreme Court and made  
 13 retroactively applicable to cases on collateral review." Cunningham "did not announce  
 14 a new rule of constitutional law." Butler v. Curry, 528 F.2d 624, 639 (9th Cir. 2008).  
 15 Because Cunningham did not announce the constitutional right upon which Petitioner's  
 16 claim is based, subsection (d)(1)(C) does not apply.

17  
 18 **IV. CONCLUSION AND ORDER**

19 In light of the foregoing, the Court **ADOPTS** the Report (Doc. No. 13),  
 20 **GRANTS** Respondent's motion (Doc. No. 10) and **DISMISSES** the Petition with  
 21 prejudice.

22  
 23 **IT IS SO ORDERED.**

24  
 25 **DATE: June 15, 2009**

26  
 27  
 28   
**HON. THOMAS J. WHELAN**  
 United States District Court  
 Southern District of California